

To: TID Committee

From: Staff and TID

Date: September 5, 2003

Subject: Update

On August 28, 2003, staff held a workshop with Turlock Irrigation District (TID) to try to reach further resolution of disputed topics. At the August 25, 2003 hearing and Prehearing Conference for TID Walnut Energy Center project, it appeared that the only contested issues were Alternatives, Facility Design, Compliance, Hazardous Materials Management, Air Quality, and Land Use. After discussing issues at the workshop, staff and TID believe that this list can be shortened as follows.

### **Subjects Appropriate for Testimony By Declaration**

Staff and TID are pleased to report that the majority of remaining subjects appear to be appropriate for presentation of evidence by declaration, without live witness testimony.

- Socioeconomics
- Traffic and Transportation
- Transmission Line Safety and Nuisance
- Hazardous Materials
- Noise
- Public health
- Biology

These subjects are ones wherein the staff and TID are either in complete agreement or substantial agreement. By “substantial agreement,” we mean that the staff and TID may have slightly difference preferences for the wording of a condition, for example, but those difference will addressed either (1) by stipulation (after staff reviews TID’s testimony) or (2) through briefing, if required. Thus, testimony by declaration is appropriate for these subjects.

### **Subjects That Are Very Likely Candidates for Testimony By Declaration**

Staff and TID have minor disagreements on two subjects that both believe will be resolved and/or submitted to the Committee for resolution without the need for live witness testimony.

- **Visual Resources**: Staff and TID have not yet reached final agreement about the timing for certain actions pursuant to proposed conditions VIS-2 and VIS-4, though both remain confident that acceptable language will be developed. The Conditions in the FSA require actions to be taken “prior to first synchronizing of any turbine to the electrical grid.” TID prefers a later time in order to avoid

conflicts with construction activities that may still be ongoing at that time. Staff and TID hope to resolve this issue by selecting a mutually agreed-to trigger.

- **Facility Design**: Staff and TID made substantial progress at the August 28<sup>th</sup> workshop on this issue. TID will memorialize this understanding in its prefiled testimony. Assuming concurrence by staff that TID's testimony reflects the understanding of the parties, this subject will be appropriate for testimony by declaration.

### **Subjects Requiring Adjudication and Live Witness**

- **Air Quality**: Staff and TID agree that there is a need to litigate portions of construction conditions AQ-C3 (related to dust mitigation and soot filters), AQ-C6 (related to ammonia slip), and AQ-C8 (additional requirements on the ERCs).
- **Land Use**: While TID believes that the parties may be able to develop a stipulation, TID would like to request thirty minutes to present live witness testimony to inform the Committee's decision on this important issue. TID also is reviewing a letter dated September 2, 2003, from the Department of Conservation's Division of Land Resource Protection to determine the probative value of this letter, and to decide whether TID may wish to compel testimony from the Department. Staff disagrees with the request for live witness testimony, unless there is a specifically identified factual dispute. Staff agrees that the City of Turlock is welcome to appear and present comments at the hearing concerning this issue. Should TID seek to compel testimony from the Department, staff believes a delay in the Land Use hearing may be necessary. TID disagrees that this may result in delays in hearings. Staff and TID also agree that there are a number of documents from the City of Turlock's land use planning process that are appropriate for official notice. TID and staff will compile a list of these documents for the Committee to be filed concurrent with TID's prefiled testimony.
- **Alternatives**: Per the Committee's request, both staff and TID have agreed to make witnesses available for questions from the Committee. Neither party expects that it will have cross-examination of the other on this topic.

### **Subjects Requiring Legal Argument**

- **Land Use**: Notwithstanding the current dispute between TID and staff regarding whether the committee should hear live witness testimony on this subject, staff and TID agree that there are important legal issues regarding the issue of prime farmland that require legal argument by the parties.
- **Soil and Water**: TID has indicated that it plans to contest S&W-1 and S&W-3, to the extent that the conditions allow the CPM the authority to approve the plans submitted thereunder to the Regional Water Quality Control Board. This is a legal issue, and the parties reserved 15 minutes each for oral arguments on this topic. However, staff and TID are currently examining language that may obviate the need for legal argument on this topic. If these efforts are successful, we will inform the Committee prior to hearings. In addition, staff and TID are

considering modifications to S&W-5 to address TID's concern about situations in which the water treatment facility is not capable of providing treated wastewater to the plant because of a force majeure event.

- **Compliance/COM-8:** Staff and TID disagree as to whether the Commission should have the authority to "approve" the security plans required by COM-8. TID also believes that the language of the condition contained in the FSA lacks specificity regarding precisely what standards or criteria the Staff will use to deem a proposed security plan "approvable." TID also suggest that the conditions may have the potential to implicate certain civil rights and Constitutional rights of its future employees. That is, TID is concerned that the lack of specificity regarding scope and nature of the required identity and employment history background and security checks could result in liability to TID as an employer. Staff and TID reserved time for both direct and cross-examination and oral argument. However, staff is concerned because it does not understand what specific civil rights and Constitutional requirements are at issue. TID concedes that the civil rights and Constitutional issues are complex and suggests that those issues are made even more complex by the lack of specificity regarding the standards and criteria the Staff will employ in finding these plans approvable. TID has committed that its prefiled testimony will clarify for Staff the scope of the civil rights and Constitutional issues as well as the problems associated with a lack of specificity. Further, TID has committed to propose language in hopes of removing the ambiguity. TID's goal is to reach an agreement that would allow this topic to be taken by declaration. Nevertheless, the Committee should note staff's strong concerns that it does not fully understand the TID's civil rights and Constitutional concerns.

### **Scheduling Issues**

Finally, staff and TID believe that the remaining evidentiary and legal issue can be dealt with during a single day of hearings. Staff and TID recommend that TID be required to file its testimony on all remaining topics no later than two weeks before the evidentiary hearing. This will provide sufficient time for staff to complete revised declarations in the following six areas: Transmission Line Safety and Nuisance, Noise, Soils and Water Resources, Public Health, Biological Resources, and Visual Resources. Staff believes, and TID agrees, that it is appropriate for staff to file these declarations after TID submits its testimony. This will also allow Staff and TID to continue to attempt to reach resolution on the remaining outstanding issues.